IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 30TH JANUARY 2007 / 10TH MAGHA 1928

RSA.No. 406 of 2003(F)

AS.61/1995 of Ist ADDL. DISTRICT COURT, TRIVANDRUM.
OS.1798/1985 of I ADDL.MUNSIFF'S COURT, TRIVANDRUM.

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APPELLANTS/APPELLANTS/ADDL.DEFENDANTS 4,6 & 7:

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1. **KRISHNAMMA, CHARUMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE.**
2. **SAI SURESH, CHARUMMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE.**
3. **SUKANYA, CHARUMMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE.**
4. **VIJALEKSHMI, CHARUMMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE.**
5. **NISHA CHANDRAN, CHARUMMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE.**
6. **NIDHIN CHANDRAN (MINOR) CHARUMMOODU VELIYATHU, MANACAUD, THOTTOM, MUTTATHARA VILLAGE, REPRESENTED BY HIS MOTHER VIJAYALEKSHMI.**

BY ADV. SRI.PIRAPPANCODE V.S.SUDHIR

RESPONDENTS: RESPONDENTS/PLAINTIFFS:

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1. **NEELALOHITHA ALIAS BHADMAKANCHANA, AMBALAVILAKATHU VEEDU, IKARAVEETTU MURI, IRANIMUTTOM VILLAGE, THIRUVANANTHAPURAM.**
2. **NEELALOHITHAN ALIAS NEELAMBARAN, AMBALAVILAKATHU VEEDU, IKARAVEETTU MURI, IRANIMUTTOM VILLAGE, THIRUVANANTHAPURAM.**

BY ADV. SRI.P.S.RAMESH KUMAR
SMT.ANNAMMA ABRAHAM
SMT.MINI N. NAIR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 30/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON IA. NO.2508/2006 IN RSA. NO.406/2003

DISMISSED

30.1.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

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M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.406 OF 2003

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Dated this the 30th day of January, 2007

JUDGMENT

Respondents are plaintiffs and appellants the legal heirs of deceased defendant in O.S.1798/85 on the file of I Additional Munsiff Court, Thiruvananthapuram. Defendant was originally the second defendant. First defendant was mother of respondents 1 and 2 and third defendant alleged to be the adopted daughter of deceased Pankajakshy. The suit was originally filed for redemption and partition. Subsequently plaint was got amended and original defendants 1 and 3 were deleted and the claim for partition was relinquished. The suit after amendment is only for redemption of Ext.A2 mortgage and recovery of possession. Case of respondents was that 2 ½ cents of plaint A schedule property was mortgaged by deceased Krishnan Neelakantan in favour of Bhagavathy Meenakshi as per Ext.A2 mortgage deed on 17-3-1958

for Rs.300/- and the mortgage right was subsequently assigned in favour of deceased defendant and respondents are entitled to redeem the mortgage. Deceased defendant in his written statement contended that the property originally belonged to Keezhpurassery tarwad and Krishnan Neelakantan and his sister Pankajakshy had only 1/4th share being members of one among the four thavazhies and Pankajakshy had executed a gift deed in favour of her adopted daughter Santhakumari, who was the original third defendant, and though the gift deed was cancelled as per the decree in O.S.687/62, Santhakumari filed O.S.319/74 for cancellation of the decree alleging that it was obtained by fraud and that suit was decreed and mortgagee Bhagavathy Meenakshy released her right in favour of the defendant, who has jenm right over 10.75 cents of plaint A schedule property and therefore respondents are not entitled to the decree for redemption sought for.

2. Learned Munsiff after framing necessary issues, recording that no oral evidence was adduced and marking Ext.A1 and A2 on the side of

respondents granted a decree for redemption of Ext.A2 mortgage and directed them to deposit the mortgage money of Rs.300/- due to the appellants, as the legal heirs of deceased defendant apply for passing a final decree. That decree and judgment was challenged before District Court, Thiruvananthapuram in A.S.61/95. Learned Additional District Judge on appreciation of evidence, confirmed the decree and dismissed the appeal. Second appeal was filed challenging the decree and judgment.

3. Second appeal was admitted on the following substantial questions of law.

1) Have the courts below acted in accordance with law in construing and interpreting Ext.A1?

2) What is the legal effect of Ext.B1 vis-a-vis Ext.A1?

3) What is the right of the 2nd defendant over the property in accordance with law? Is it as a sharer of the equity redemption or only as an assignee mortgage?

2. Learned counsel appearing for appellants and respondents were heard.

3. The argument of learned counsel appearing for appellants was that Ext.A1 partition deed itself establish that plaint A schedule property originally belonged to Keezhpurassery tarwad and the tarwad has four thavazhies and each thavazhy had 1/4th right and though in Ext.A2 mortgage deed executed by Neelakantan and the mortgagor has stated that he has absolute right over 21 ½ cents, which was mortgaged thereunder, he had only 1/4th right. It was also argued that though it was contended that on the death of Pankajakshy issuless, her right also devolved on Neelakantan, Pankajakshy had an adopted daughter in whose favour a gift deed was executed by deceased Pankajakshy which was sought to be cancelled by instituting O.S.687/62 and though a decree was granted in that suit, Santhakumari the adopted daughter in turn instituted O.S.319/74 and got that decree set aside establishing that the decree in O.S.687/62 was obtained by fraud and therefore Pankajakshy also has right over the properties claimed by Neelakantan. It was also argued that though Bhagavathy Meenakshy, the mortgagee under Ext.A2,

has been in possession of the property, subsequently admitting the right of defendant over 10 ¾ cents of the property, released her right in favour of deceased defendant and therefore deceased defendant was not an assignee mortgagee but got released the mortgage right as he has the right of equity of redemption and therefore respondents are not entitled to the decree sought for. The argument of learned counsel appearing for appellants was that courts below did not properly appreciate the contentions raised by appellants and in the light of Ext.B1 and Ext.A2, it is to be held that respondents 1 and 2 are not entitled to the decree for redemption.

4. Learned counsel appearing for respondents 1 and 2 argued that Ext.A2 mortgage by Neelakantan in favour of Bhagavathy Meenakshy is admitted by deceased defendant and appellants and that mortgage right of Meenakshy was assigned under Ext.B1 and deceased defendant is only an assignee mortgagee and respondents being the legal heirs of deceased mortgagor are entitled to redeem that mortgage and therefore there is no reason to interfere with the

decree for redemption granted by the trial court and confirmed by appellate court and no substantial question of law is involved.

5. Appellants are not disputing Ext.A2 mortgage. Under Ext.A2, Krishnan Neelakantan created a mortgage over 21 ½ cents of plaint A schedule property. Ext.A2 shows that before the said mortgage some of the coconut trees were mortgaged in favour of Krishna Panicker and Ext.A2 mortgage was created thereafter in favour of Meenakshy. Ext.B2 shows that Bhagavathy Meenakshy, the mortgagee under Ext.A2, got assigned the mortgage right of Krishna Panicker. Therefore apart from Ext.A2 mortgage Meenakshy also obtained the mortgage right of Krishna Panicker in respect of coconut trees. Ext.B1 establish that the mortgagee Meenakshy transferred her right in favour of defendant under the said document. The argument of learned counsel appearing for appellants was that in Ext.B1, it has been stated that the property originally belonged to the tarwad and there was a partition in the tarwad in 1105 M.E. and thereafter there were two partitions on 1121

M.E. and 1122 M.E. and deceased defendant obtained 10¾ cents of right over the property and the mortgagee released the mortgage right in favour of deceased defendant and therefore the right transferred under Ext.B1 is not an assignment of the mortgage right but was releasing the mortgage right in favour of the deceased defendant as he has the right of equity of redemption. It is on that basis the substantial questions of law namely the legal effect of Ext.B1 vis-a-vis Ext.A1 was framed.

6. Ext.A1 partition deed shows that property originally belonged to Keezhpurassery tarwad which consisted of four thavazhies and thavazhies were separated as per a partition deed in 1109 M.E. The properties were thereafter divided under Ext.A1.21 ½ cents, which was mortgaged under Ext.P2 was allotted to the thavazhi of Krishnan Neelakantan and others. It was on the strength of the right derived under Ext.A1, the property was mortgaged under Ext.A2. Deceased defendant or appellants have no right of equity of redemption of Ext.A2 mortgage, which vested with Krishnan Neelakantan. It was never transferred to deceased defendant.

Appellants case was only that deceased defendant had 1/4th right over the plaint A schedule property and that 1/4th right would come to 10¾ cents and therefore they have jenm right over that property and under Ext.B1 the mortgagee released the mortgage right in favour of deceased defendant. The question whether deceased defendant or the appellants being his legal heirs, have independent right over the plaint A schedule property is not to be decided in the suit. The suit is only for redemption of Ext.A2 mortgage. Ext.A2 mortgage was created by deceased Neelakantan. So long as the deceased defendant or appellants have no case that the right of equity of redemption of Neelakantan vested even a fractionally right on deceased defendant, deceased defendant or appellants are not entitled to contend that they have got a right of equity of redemption of Ext.A2 mortgage. Therefore even if it is stated in Ext.B1 that the mortgage right was was released in favour of deceased defendant, it could only be a transfer of the right of mortgagee by Bhagavathy Meenakshy under Ext.A2. If that be

so, under Ext.B1 deceased defendant could only claim the mortgage right, which originally vested with Meenakshy under Ext.A2. Being the legal heirs of the deceased mortgagor Neelakantan, respondents are entitled to redeem the mortgage. I do not find any error committed by the courts below either in construing or interpreting Ext.A1 or the legal effect of Ext.B1 as canvassed in the appeal. Courts below rightly granted a decree for redemption of Ext.A2 mortgage, on deposit of the mortgage money. Appellants have to work out their independent right, if any, over the plaint A schedule properties in a separate suit. Though appellants produced documents as additional evidence, in the Second Appeal they are not relevant or necessary to dispose the Second Appeal. As the documents are not marked, appellants are entitled to take them back.

Second Appeal dismissed but without cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006